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Client Alert

Natural Resources Commission Orders Alcoa Entity to Investigate and Address Buried Toxic Wastes

The NRC Rejects Reclamation Bond Release, Finding Violations of Indiana's Surface Mining Control and Reclamation Act

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The Indiana Natural Resources Commission, in a case of first impression, has held that Squaw Creek Coal Company, a purported joint venture of Alcoa, Inc., violated various provisions of Indiana's Surface Mining Control and Reclamation Act ("I-SMCRA"), Ind. Code § 14-34 *et seq.*, and that the Indiana Department of Natural Resources failed to properly evaluate Squaw Creek's Phase III bond release application for Squaw Creek Mine, Booneville, Indiana under I-SMCRA. The case, entitled *Musgrave v. Department of Natural Resources and Squaw Creek Coal Company*, Admin. Cause No. 08-034R, analyzed the impact that Squaw Creek's mining had on Alcoa's dumping of hundreds of thousands of tons of toxic waste at Squaw Creek Mine, including the impact on surface water and groundwater. Plews Shadley Racher & Braun LLP attorneys Peter Racher and Stephanie Eckerle represent Bill Musgrave, the petitioner.

The NRC's decision is significant due to its interpretation of I-SMCRA as imposing a duty on coal mine operators to evaluate not only impacts from waste arising from coal mine operations, but also from other sources, such as Alcoa's historical toxic waste dumping, when applying for a bond release.

This case arises from Alcoa's undisputed dumping of massive amounts of toxic waste at Squaw Creek Mine, including approximately 69 million gallons of tarry waste and wastewater, between 2.2 and 7.9 million cubic feet of chromium hydroxide sludge, and 34,800 tons of spent pot lining, which contains cyanides and fluorides. In addition, Alcoa has not accounted for toxic waste disposals occurring during a ninety-one month period between 1968 and 1977. After this dumping occurred, Squaw Creek applied and was granted Permit S-008 for mining at Squaw Creek Mine.

I-SMCRA requires coal mining permit holders to post a reclamation bond to assure that the mined ground will be restored to its pre-mining condition. In 2007, Alcoa applied for a release of the bond for the S-008 permit, including a Phase III release of 955.37 acres. DNR granted this and erroneously found that not only did Squaw Creek comply with all aspects of I-SMCRA but that there is no evidence that Alcoa's toxic waste is problematic to the hydrogeology of the area.

In releasing the bond, DNR and Squaw Creek refused to evaluate the impact that the mining had on Alcoa's buried toxic wastes and the ongoing pollution this waste is causing to surface and subsurface water in the Squaw Creek and Cypress Creek drainage basins in Warrick County. Instead, DNR and Squaw Creek attempted to abrogate these responsibilities by claiming that only the Indiana Department of Environmental Management had jurisdiction over the dumping of Alcoa's toxic wastes.

Administrative law Judge Jensen, after analyzing thousands of pages of briefing and exhibits, came to the conclusion that "fate and migration of the waste and waste constituents are logically impacted by [Squaw Creek's] mining activities." In addition to acknowledging that the waste disposals that are unaccounted for are especially problematic, Judge Jensen found that there was a significant potential for release of the toxic wastes through the contamination of surface water while percolating through the waste containing and permeable mine overburden at Squaw Creek Mine. Further, Judge Jensen acknowledged that the migration to groundwater represents a potentially complete exposure pathway for Alcoa's toxic waste. The toxic wastes, therefore, can reasonably be inferred to, at minimum, impair or be injurious to organisms living in and around the Squaw Creek Mine. Order ¶ 157. Further, "the permeable overburden, which resulted from [Squaw Creek's] mining operation, will have a direct impact on the fate and migration of Alcoa's waste and waste constituents and in this way [Squaw Creek's] mining activities are directly associated with the pollution of surface and subsurface water that is presently occurring and will continue to occur in the future." Order ¶ 161.

In holding Squaw Creek and DNR's release of the Phase III bond improper, Judge Jensen found numerous violations of I-SMCRA. When Squaw Creek filed its bond with DNR, it was "conditional upon faithful performance of all the requirements of this article." Ind. Code § 14-34-6-9. Further, 312 IAC 25-5-16(e)(3) requires that DNR "may release the remaining bond only after the: (A) operator has successfully completed all surface coal mining and reclamation activities required in IC 14-34, this article, or the permit . . ." Therefore, based upon Ind. Code § 14-34 and the rules promulgated thereunder, a "Phase III bond release must be evaluated in broad terms encompassing not only compliance with the individual permit but also considering compliance with the entirety of Indiana Code §§ 14-34 et seq. and 312 IAC 25 et seq." Order ¶ 144.

I-SMCRA specifically required Squaw Creek to minimize disturbances to the prevailing hydrologic balance at the mine site and associated offsite areas and to the quality and quantity of water in surface and ground water systems during and after surface coal mining and reclamation operations. Squaw Creek was required to, among other things, avoid acid or other toxic mine drainage by preventing or removing water from contact with toxic-producing deposits (here, just the opposite occurred); treating drainage to reduce toxic content that adversely affects downstream water upon being released to watercourses; and casing, sealing, or otherwise managing boreholes, shafts, and wells and keep acid or other toxic drainage from entering ground and surface water. See Ind. Code § 14-34-10-2(b)(13(A)); Order ¶ 145. Further

Squaw Creek Mine was required to avoid drainage from toxic-forming spoil from entering into ground and surface water by taking certain steps as identified in 312 IAC 25-6-19. Order ¶ 146. These provisions and the definition of “toxic-forming material” became very important in understanding the obligations that I-SMCRA imposes on both Squaw Creek and DNR.

“Toxic-forming material means earthen materials or wastes that, if acted upon by air, water, weathering, or microbiological processes, are likely to produce chemical or physical conditions in soils or water that are detrimental to biota or uses of water.” 312 IAC 25-1-154 (emphasis added); Order ¶ 147. This definition of “toxic-forming material” suggests that the waste referred to therein do not have to be directly related to surface coal mining or reclamation activities. Order ¶ 148; *See Hoosier Env. Council v. DNR and Foertsh Construction Company, Inc.*, 7 CADDNAR 162, 169 (1997). Similarly, toxic mine drainage was found to encompass drainage that has a chemical action or physical effect and is discharged from a mine operation, not drainage that results directly from mining operations or reclamation activities. Pursuant to these definitions, the Court held that I-SMCRA contemplated and applied to situations where mining occurred in locations where toxic forming materials had been placed by entities such as Alcoa. Order ¶ 148; *See Hoosier Env. Council v. DNR and Foertsh Construction Company, Inc.*, 7 CADDNAR 162, 169 (1997). The Court also held that the toxic waste dumped by Alcoa at Squaw Creek Mine could be used as “backfill” under I-SMCRA because it was used to fill excavation pits. Order ¶ 155; *See* 312 IAC 25-6-21.

Judge Jensen held that Squaw Creek took or failed to take the following actions in violation of I-SMCRA:

- (1) Squaw Creek facilitated the most significant potential for the release of toxic waste by creating highly permeable overburden and allowing water to travel through the toxic waste and flow to the point of lowest discharge, in some cases to nearby Cypress Creek;
- (2) Squaw Creek failed to minimize disturbance to water quality by preventing or removing water from contact with Alcoa’s toxic waste;
- (3) Squaw Creek actively participated in the burial of Alcoa’s toxic waste at depths it knew would result in contact with water;
- (4) Squaw Creek did not take steps to remove water from contacting toxic wastes or take steps to treat drainage to reduce toxic content;
- (5) Squaw Creek did not take action to treat drainage to reduce toxic content that adversely affects downstream water; and,
- (6) Squaw Creek did not take steps to prevent water from coming into contact with acid-forming and toxic forming spoil.

Therefore, the “evidence overwhelmingly establishes” that Squaw Creek’s request for a Phase III bond release was premature. It also establishes that DNR failed to properly evaluate Squaw Creek’s Phase III bond release application in terms of the entirety of I-SMCRA.

In addition to the violations of I-SMCRA stated above, the Court decided several other important issues. First, the NRC held that although a portion of Squaw Creek’s mining activities occurred prior to the implementation of I-SMCRA, I-SMCRA still applied. Thus, Squaw Creek’s pre-SMCRA mining activities cannot be distinguished from post-SMCRA mining activities as it relates to the migration of the toxic waste. Musgrave was also successful on defeating DNR and Squaw Creek’s challenges relating to lack of subject matter jurisdiction, standing, collateral estoppel and res judicata and failure to state a claim upon which relief may be granted.

If you have any questions regarding the case described above or Indiana's Surface Mining Control and Reclamation Act, please do not hesitate to contact Peter Racher or Stephanie Eckerle of PSRB.